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IN THE

Supreme Court of the United States

October Term, 1938.

No. 22

UNITED STATES OF AMERICA,
Petitioner,

vs.

CONTINENTAL NATIONAL BANK AND TRUST COMPANY, Trustee Under the Last Will and Testament of James Duggan, Deceased, et al.,
Respondents.

BRIEF FOR CONTINENTAL NATIONAL BANK AND TRUST COMPANY OF CHICAGO, TRUSTEE UNDER WILL OF JAMES DUGGAN, DECEASED, FOR CHILDREN OF TIMOTHY DUGGAN.

Herbert Pope,
Counsel for Continental National Bank and Trust Company of Chicago, Solely as Trustee under Will of James Duggan, Deceased, for the children of Timothy Duggan.

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STATEMENT OF QUESTIONS RAISED.

The bill in this case is a suit to collect a tax based on the trust fund theory. It seeks to establish the liability of the Johnston City & Big Muddy Coal & Mining Company for an income tax claimed to be due on account of an alleged sale at a profit of some of its property in 1920 and the liability of the defendants as transferees of the property of the corporation. The bill was filed in 1932 and defendants filed a motion to dismiss on the ground that the bill stated

no cause of action and that the statute of limitations barred the suit. Not until 1937, when the case was resurrected by the District Court, did this motion come up for disposition.

After a brief had been filed in support of the motion calling attention to the decision of this Court in *United States* v. *Updike*, 281 U. S. 489, and the fact that the suit had not been brought within six years after the making of an alleged assessment against the taxpayer, the Government asked leave to file an amendment, setting forth an alleged jeopardy assessment against James Duggan, deceased, some two years after he was known to have died, on the ground that "This amendment is necessary because the allegation that an assessment was made against James Duggan, deceased, was omitted from the original bill of complaint, and is an important fact in determining whether the present action was timely brought against these defendants." (R. 15.)

Before leave was granted by the District Court to file the amendment the Government confessed the motion to dismiss the original bill. (R. 13.) This was a confession that the original bill stated no cause of action and, if it did, that the suit was barred by the statute of limitations. A motion was then made to dismiss the amended bill and the District Court subsequently sustained this motion.

As to the jeopardy assessment, we believe it is clear that it does not avoid the bar of the statute of limitations as to the only cause of action which Government counsel assume was alleged in the original bill, even if such an assessment against a man who had been dead two years could possibly have any validity or effect for any purpose.

The assessment against the corporation was made in January, 1925 and the jeopardy assessment against James Duggan, deceased, was made on February 14, 1931. (R. 3, 15.) This was more than six years after the assessment

against the corporation and after any suit against any transferees of property of the corporation was barred under the decision of this Court in the *Updike* case. It is conceded that the proceeding before the Board of Tax Appeals involving James Duggan did not suspend the Government's right to bring a suit such as this is claimed to be against transferees of property of the corporation. (Brief, p. 36.) Section 280 suspended only the right to make an assessment against James Duggan. This suit was not commenced until 1932 and is, as we shall show, even as amended in 1937, necessarily outlawed on any possible view.

The public records of the Board of Tax Appeals disclose what may properly be called the joker in this case, and, in view of the long lapse of time that has occurred, it is only fair that this Court should be informed of the situation, so that it may understand why this case is here, or rather, why it should not be here.

In the statement of facts in the proceeding in the Board of Tax Appeals (18 B. T. A. 608) a trust agreement of December 31, 1919, is set forth which shows that the stock of the Johnston City & Big Muddy Coal & Mining Company, which formerly was held by four brothers and sisters in equal shares, was transferred to trustees under the provisions of the trust. It also shows a contract dated March 31, 1920, between the trustees and the purchaser of the mining property in question and an undertaking by the trustees to convey the property to the purchaser.

Then, if we look at another decision of the Board of Tax Appeals in an estate tax case entitled "Appeal of James Duggan, Executor, Estate of Hanna Duggan, 6 B. T. A. 1098," we see that one of the beneficiaries of the aforesaid trust, Hanna Duggan, died on May 18, 1923, that the trustees of the trust were then in posses-

sion of securities which represented the proceeds received by them on their sale of the property and that the trustees were recognized by the Revenue Bureau and the Board as the transferees in 1920 of the property of the corporation here in question.

The transaction in 1920 involved a conveyance of real estate and it appears that the property in question was conveyed for the trustees through James Duggan to the purchaser. This is explained by the settled conveyancing practice in Illinois of never conveying the record title to real estate to trustees except by a record conveyance from an unmarried person. James Duggan answered that description and was not a trustee, but, instead of conveying to the trustees, the naked legal title was passed through him to the purchaser. He had the naked legal title only for an interval of time and could not, under the law of Illinois, be held entitled to be or to be in fact the real transferee of the property in question. If it had been known by the parties in 1920 that the rule of *Gray* v. *Darlington*, 15 Wall. 63, regarding the taxability of capital gains was to be overruled by this Court in the next year, very likely the parties would have been more cautious and would have used a stranger instead of James Duggan as the conduit through which to convey the real estate. Obviously, however, James Duggan had no more interest than such a stranger and served only as a conduit for the transfer of the legal title for the trustees who owned all the stock and made the contract to sell the property.

The irony in the situation is further disclosed by the fact that, under the terms of the trust, the trust property was to be distributed finally to the survivor of the four brothers and sisters, and James Duggan proved to be that one. On his death the administrator of his estate proceeded in due course to transfer the property in the estate to the parties

entitled under his will. The administrator could not, as a fiduciary, waive any rights he might have with respect to the Board proceeding. No attempt was made to bring him into the Board proceeding. The Board proceeding could relate only to property, if any, which had been transferred to James Duggan as the owner in 1920, and the administrator had not received any such property. The opinion of the Board member and the allegations of the bill in equity as to James Duggan's position in 1919 and 1920 (R. 3) are inconsistent with the records of the Board itself. Far from being the chief stockholder of the corporation, those records show that he was not a stockholder at all but had a one-fourth (and, as a result of the assignment of March 31, 1920, only a one-sixth) equitable interest in the stock (6 B. T. A. 1098, at pp. 1099, 1100).

If this Court will read the opinion of the Board member, Mr. Lansdon, it will realize why no fiduciary could voluntarily appear in the Board proceeding. Mr. Lansdon, unfortunately, was the one member of the Board who was not a lawyer, and the opinion discloses a determination in any event to make James Duggan a present of some property he did not have in order to sustain the Government's claim for a tax.

The Commissioner claimed a tax for some reason against Michael Duggan as well as James Duggan and both were parties to the Board proceeding. Michael Duggan died in 1928 and James Duggan died in March, 1929 before the case involving both decedents was submitted to the Board. This Board proceeding is referred to in the bill apparently for the purpose of supporting the contention that the jeopardy assessment against James Duggan, deceased, was made in time and therefore that the amended bill in 1937 was filed in time. As we shall show, however, the right to bring suits such as this was not suspended at all

by the Board proceeding and this suit was barred bef
the jeopardy assessment was made or this suit commenc

We also contend that the jeopardy assessment was
valid on its face, because it is against James Duggan,
ceased, and there could be no jeopardy so far as any pr
erty belonging to James Duggan in this world is concern
Further, we contend that if the time to make a jeopar
assessment can be extended by a Board proceeding ev
though the right to make such an assessment is not s
pended, the suspension of the right to make any assessm
would not continue beyond the death of James Duggan
less the administrator of his estate was properly made
party to the Board proceeding. The jeopardy assessme
therefore, was too late for any purpose.

ARGUMENT.

I.

The Order of the District Court Dismissing the Amended Bill of Complaint Is Sustained by the Confession of the Motion to Dismiss the Original Bill on the Ground That It Stated No Cause of Action.

In the Court of Appeals and in the District Court Government counsel ignored the effect of their confession of the motion to dismiss the original bill in this case in spite of the insistance of counsel for the defendants that the confession disposed of the whole case. Now, in their brief in this Court, Government counsel state that this point has been abandoned. Of course there has been and can be no abandonment of the order entered by the District Court and of any fact or ground appearing in the record which supports the order entered by that court sustaining the motion to dismiss the amended bill and dismissing the bill.

This suit was evidently intended to be a suit in equity, based upon the trust fund theory, against alleged transferees of property of the Johnston City & Big Muddy Coal & Mining Company to collect a tax alleged to be due from that company. That is the contention made in the Government briefs. A motion was made to dismiss the bill upon two grounds, namely, that it failed to state a cause of action and that any supposed cause of action was barred by the statute of limitations. Five years after the suit was commenced, the plaintiff confessed this motion to dismiss the original bill. Thereafter the court granted plaintiff leave to file an amendment. The amendment was by its terms expressly limited to the question of the statute of limitations. A motion was then made to dismiss the bill as

amended and this motion was subsequently sustained and the bill dismissed.

Having confessed the motion to dismiss the original bill on the two grounds stated in the motion, and having made an amendment to the bill which related only to the statute of limitations, the confession of plaintiff that the bill stated no cause of action was not remedied or removed by the amendment. A bill filed in time might fail to state a cause of action. In that state of the record the District Court was not only justified in dismissing the amended bill, but it is difficult to see how it could do anything else.

In the brief filed in the District Court in support of the motion to dismiss the amended bill of complaint it was expressly contended that the amendment was wholly insufficient to rescue a pleading which was confessed to have stated no case. The order entered by the District Court must be considered at least to have sustained this contention and there is no ground now for reversing the order of the District Court. The Court of Appeals, in spite of the fact that this same contention was made in that court, chose to rest its affirmance of the order of the District Court on other grounds. However, the obstacle presented to the reversal of that order by reason of the confession of the motion to dismiss still remains.

Government counsel seem to have the idea that they need pay no attention to the record in the District Court. It is now suggested in the Government brief (p. 33) that if this case is still to be heard upon what is called the merits the decision of the Board of Tax Appeals may somehow be brought into the case as if a plea of *res judicata* had been alleged in the bill of complaint. Knowing that the allegations of the bill in regard to James Duggan are inconsistent with the records of the Revenue Bureau and the Board of Tax Appeals and cannot possibly be proved, the sugges-

tion now is that, notwithstanding the record in the District Court, the bill shall be changed again to present a new claim which admittedly is not presented by the bill as it now stands. Evidently even Government counsel are not yet sure that their bill states a good cause of action or, if it does, just what kind of a cause of action it may be. How the District Court, in view of the record now made in that court, can entertain this new suggestion, it is difficult to see.

Certainly a court of equity should not disregard the record before it in order to continue this litigation indefinitely. With interest accumulating at the rate of six per cent a year on a tax claim for the year 1920, it is obvious that there will be no property left for taxpayers by the time the Government has exhausted all the theories which it may still invent to sustain a tax in this case. In the meantime it has collected estate taxes on one theory and tried to collect income taxes on a wholly inconsistent theory. No wonder that Mr. Magill, on leaving the Treasury Department recently, suggested that one of the first things the Government should do is to provide some tax statutes which the Government at least can understand even if the taxpayer cannot. There is no equity in the Government's position when it seeks to take advantage of the uncertainty of its own statutes and the changing views of the courts to force payments from taxpayers when resistance means endless litigation with a yearly penalty of six per cent interest and the possibility that some court may adopt a new theory of law at the end of the period.

We will discuss the other questions raised by the Government brief on the assumption that the bill states a cause of action on the trust fund theory, but we insist, as we always have done, that the whole case was disposed of by the confession of the motion to dismiss the original bill.

We cannot change the record in the District Court even if we were so disposed. The order of the District Court should stand because no other order can be justified by the record.

II.

That This Suit Is in Any Event Barred Under the Provisions of the 1926 Revenue Act Is Settled by the Decision of the Supreme Court in United States v. Updike, 281 U. S. 489.

Government counsel apparently are convinced that by repeatedly citing the decision of this court in *United States* v. *Updike*, 281 U. S. 489, without stating what that case actually decides, they will be able to make this Court believe that that decision supports the wholly different conclusion which is asserted but not really argued in their brief.

It is clear at any rate that no cause of action can be considered as stated at any time in this bill except a cause of action based on the trust fund theory to collect from a transferee a tax alleged to be due from the Johnston City & Big Muddy Coal & Mining Company. This cause of action, if properly alleged in the original bill, was necessarily barred by the statute of limitations contained in the 1926 Act, on which counsel rely, and the pleading of the jeopardy assessment against James Duggan, deceased, has not remedied this defect in any respect. Government counsel have advanced several different theories to support their contention. Their final effort in the brief filed in this Court does not escape the conclusion of this Court in the *Updike* case.

Section 280 of the Revenue Act of 1926 deals, amongst other things, with matters of procedure relating to the liability of transferees of property of a taxpayer. As gov-

ernment counsel state in their brief (p. 25) the Commissioner is given the right to proceed under Section 280 against any transferee, an initial transferee or a subsequent transferee, and finally to make an assessment of the established liability of any such transferee. A proceeding against one transferee, however, has no relation to a proceeding against another transferee, whether an initial transferee or a subsequent transferee. Such a proceeding against one transferee does not suspend the right to proceed against another transferee, and the liability which is established is the separate liability of each transferee against whom such a proceeding is commenced. The court so held in *Commissioner* v. *Krug*, 78 F. (2d) 57 (C. C. A. 9th Circuit). In that case the Commissioner proceeded under Section 280 first against one transferee of the taxpayer and, two years later, against another transferee of the taxpayer, claiming that the first proceeding suspended the running of the time for the second proceeding, but the court held that a proceeding against one transferee did not affect or suspend the right or the time to proceed against another transferee.

There is nothing in the statute to suggest, much less to provide, that the assessment thus made against one transferee has any relation to the time within which a suit in equity may be brought against another transferee, whether initial or subsequent, on account of his receipt of property of the original taxpayer.

The question of how the assessment obtained against one transferee under Section 280 shall be collected is a matter with which we are not really concerned in this case, but the suggestion of government counsel as to the time within which a suit in equity may be brought even against that transferee is clearly erroneous. (Brief, 23.) If the government elects to proceed against a transferee under Section 280 instead of by bill in equity in court on the trust

fund theory, it does not thereby extend the time within which such a bill in equity may be brought subsequently against that transferee. If an assessment, as the result of the proceeding under Section 280, is finally made, that assessment does not give the government an additional six years from the date of that assessment within which to bring a suit in equity on the trust fund theory to collect the tax from that same transferee. The right to bring such a suit was never suspended and it would be barred if commenced more than six years after an assessment against the original taxpayer. Of course there would be no sense in bringing such a suit, but, in view of the argument of Government counsel on pages 22 and 23 of their brief, it is important to point out that the period within which such a suit must be brought would still be six years from the time of assessment against the original taxpayer and not six years after the assessment against the transferee in the proceeding under Section 280.

Section 280 was intended to give the government an election either to adopt a course against a transferee which might lead to a Board proceeding or bring a suit in equity on the trust fund theory. There was no reason for suspending the right to sue in equity if the government elected to proceed under Section 280. Nor was there any reason for extending the time within which such a suit might be brought either against the same transferee or a transferee of that transferee. Only the right to make an assessment was suspended during the Board proceeding, and it was expected that an assessment would be secured which could be enforced against someone by distraint or a lien. It was not expected that after assessment the Government would wish to resort to the remedy in equity which it had already decided not to pursue, and therefore the statute did not offer the Board proceeding with the right also to bring a

suit in equity during another period of six years after an assessment was secured under Section 280.

The language in Section 280 on which government counsel rely, that the liability of the transferee shall be "assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in tax," does not confer a greater right or provide a different period of limitation for bringing equity suits like this one than is provided in Section 278(d). It does not provide that a right to sue shall continue even if the time for exercising such right has been allowed to expire. It follows necessarily that when a suit in equity is brought against any transferee of property of the original taxpayer the suit must be brought within six years after the assessment, if any, against the taxpayer. The time for bringing such a suit is not extended by reason of a subsequent assessment against a prior or other transferee as the result of a proceeding under Section 280.

In this case the jeopardy assessment against James Duggan, deceased, was not made until suits in equity such as this were barred by the applicable statute of limitations. The assessment against the corporation was made in January, 1925, and the jeopardy assessment against James Duggan, deceased, was made February 14, 1931. Section 280 contained no provision suspending a suit like the present one against transferees, and no effect, therefore, could be given to the assessment against James Duggan, deceased, which would result in reviving a cause of action already barred. The language in Section 280(a) cannot be construed in a way which might make the provision invalid.

This is all explained in the decision of this court in the *Updike* case. This court there states that the effect of the language in Section 280 above referred to "is to read into

that section, and to make applicable to the transferee equally with the original taxpayer, the provision of § 278 (d) in relation to the period of limitation for the collection of a tax. * * * It follows that if by § 278 (d) the period of limitation had run in favor of the corporation (the original taxpayer), it had run in favor of the transferees."

When the Circuit Court of Appeals in its opinion said "We think it was not intended that the six-year provision of Section 278 should be read into it," that is, into Section 280, it meant obviously that an additional six-year period after an assessment against a transferee under Section 280 was not provided for by the language in Section 280 above referred to. Section 278(d) could not provide such a six-year period by being read into Section 280, and the Circuit Court of Appeals did not intend to disagree with the conclusion of this Court in the *Updike* case.

Section 278(d), if it is to be read into Section 280, must be taken as it stands. It says nothing about assessments against transferees, and Section 280 says nothing about suspending or extending the time within which suits may be brought against transferees. If a distinction was to be made between transferees and transferees of transferees a new statutory provision, as in the 1928 Act, was required.

Section 280 was supposed to provide a simpler and more direct method for assessing and collecting a tax from a transferee than was provided by a suit. If no appeal was taken to the Board from the sixty-day letter then assessment and distraint could follow at once. If an appeal was taken, then assessment and distraint would follow immediately upon the Board's finding of a tax if no court appeal was taken. Government counsel jump from the contention that the assessment against James Duggan, deceased, should be enforceable in some way to the conclusion that it can be enforced in a transferee suit such as this,

even though this suit in equity is brought more than six years after assessment against the original taxpayer, and they cite the *Updike* case to support this conclusion without any attempt to show how it does it.

Clearly, as we have shown, the *Updike* case disposes completely of the government contention. Any other conclusion would involve absurd results. It is admitted by government counsel that the Board proceeding involving James Duggan would not prevent an equity suit against the defendants in this case even while the Board proceeding was still pending. (Brief, 36.) Yet such a suit must have been dismissed if brought more than six years after assessment against the corporation, and necessarily there could not be another suit after the Board proceeding was ended against the same transferee on the theory that a suit once barred could be maintained under a different statutory provision. There cannot be two periods of limitation governing the same kind of suit against the same parties, so that a suit once held to be barred could be brought over again.

Government counsel agree with the Court of Appeals "that Congress did not intend to allow a six-year period of limitation for the collection of each successive transfer of the liability of the original tax" (Brief, 23), but the explanation offered, unless it defeats the main contention of counsel in this case, does not explain. If, after assessment in a proceeding under Section 280, there is another six years in which to bring a suit in equity against a transferee to collect a tax, then, within one year after the period for making such assessment under Section 280, there should be the opportunity to send a sixty- or ninety-day letter to that transferee's transferee and get another assessment against him and so on indefinitely. And after each assessment there should be another six-year period for collection

of the tax by a suit in equity, if the language in Section 280(a) means what counsel say it means. Each assessment against a transferee in a proceeding under Section 280 would be the equivalent of an assessment against the original taxpayer, and this game could be continued for any length of time. That is what the government contention comes to if it has any meaning.

Obviously this theory cannot be sustained. An assessment against a transferee in a Section 280 proceeding cannot be substituted for an assessment against the original taxpayer. Section 278(d) cannot be made over to fit that theory. The right to bring a suit in equity to collect a tax from a taxpayer or a transferee still expires six years after the assessment against the original taxpayer. After that time no assessment against a transferee can put life into an equity suit that is already barred. The Court of Appeals' answer to this contention of counsel was that in that case the Revenue Act of 1928 should apply to the 1931 assessment.

It should also be pointed out that the provisions of the 1928 Act confirm our contention as to the meaning of the 1926 Act and the decision of this Court in the *Updike* case. The 1928 Act, by referring for the first time expressly to transferees of a transferee, was intended to broaden and extend the provisions of the 1926 Act. It is certainly significant, as the Court of Appeals shows, that this suit would be barred if the provisions of the 1928 Act are applied to the facts in the case. In that view there is no justification for giving a strained construction to the Act of 1926 in order to extend its limitation provisions far beyond anything provided in the 1928 Act. Even in the matter of the assessment of the liability of a transferee of a transferee the provision is that that must be made in any event within three years after the expiration of the period for assessment against the original taxpayer.

A proceeding under Section 280 is intended to result in an assessment that can be utilized. Even if it cannot be used to extend the time for bringing suits in equity to collect taxes from other transferees, it can be the basis for distraint or for a lien on property and a suit to enforce the lien. In this case the only reason for attempting to bring an equity suit that was barred against another transferee was that the assessment against a dead man could not be used for purposes of distraint or for securing a lien. Because it was of no use for such purpose the attempt was made to use it as the beginning of a new six-year period for starting another proceeding to collect the tax—an equity suit that was already barred. Government counsel are asking for a new construction of the statute just to help them out in this particular case. Why spend five years on a Board proceeding if the Government were coming out in the end only with a belated equity suit which might have been filed in time against a real transferee even if the Board proceeding involving James Duggan had never been started?

We have assumed for the purpose of the foregoing argument that the assessment against the dissolved corporation in 1925 was valid. Whether it is or not, the result is the same so far as this case is concerned. If it is invalid this suit was barred on May 16, 1926, under Section 277 (a) (3) of the Revenue Act of 1926 which allows five years after the filing of a return in which to commence a proceeding in court for the collection of the tax. We will refer to the question of dissolved corporations in connection with the later discussion of assessments against deceased persons.

III.

The So-Called Jeopardy Assessment Against James Duggan Two Years After His Death Could Have No Legal Effect so Far as Appellees Are Concerned, and, If It Be Assumed That It Might Have Any Legal Effect, Then in Any Event It Came Too Late.

The first comment to be made about the Board of Tax Appeals proceeding and the jeopardy assessment against James Duggan, deceased, is that they did not accomplish the purpose intended by such a proceeding and by an assessment based upon a Board decision. The Board had no means of enforcing its own order or decision, and the decision which it made did not enable the Commissioner to make an assessment which could be used for purposes of distraint or for the enforcement of a lien upon any property. The whole object of a Board proceeding was completely nullified. Apparently the Board thought it was entitled to proceed without anyone but the Commissioner before it and make a determination of the tax and leave it to the Commissioner to decide whether anything could be done with its order.

It seems clear that if Michael Duggan and James Duggan had both died before sixty-day letters were addressed to them, the Commissioner could not have made valid assessments against them as deceased persons because they had not appealed to the Board of Tax Appeals within the allotted time. The appeals which they did take while living suspended the Commissioner's right to make some kind of an assessment at any rate. They both died before their cases were argued or submitted to the Board. James Duggan could not take an appeal to the Court of Appeals from the decision made against him after his death any more than he could have appealed to the Board if

he had died before the time for that appeal. In both instances the purpose of the proceeding was to secure an assessment against a person who was alive, not against a person who was dead. It may be that some courts hold in some cases that a suit in court may continue after a party has died and a judgment may be entered *nunc pro tunc* as of the date of such party's death. No such procedure by the Board would accomplish the purpose for which it exists or accomplish the result which Government counsel desire, and it was not attempted in this case. What it did was of no effect and the Board proceeding must therefore be held to have abated at the date of James Duggan's death.

It may be that where a petitioner is before the Board the proceeding can be considered as pending even though the Board finally holds that for some reason it never had jurisdiction. It is an entirely different matter to hold that a Board proceeding may be continued indefinitely without any petitioner before it, and that ultimately a final order may be made against the deceased petitioner, who can take no appeal, and that after the time for taking an appeal has expired the Board proceeding will then, and only then, be considered as at an end. It is claimed that then a jeopardy assessment or some other kind of an assessment may be made against the decedent for the purpose of determining the time for starting a suit to collect a tax from someone else. There does not seem to be any other purpose which such an assessment could serve, and we believe that if it is not good for any other purpose it cannot be valid merely for the purpose of determining the time for starting a suit against someone else, even assuming that such a suit would otherwise be available. Obviously Government counsel are asking this Court to create some new law in order to cure their blunders in this particular case.

With reference to the power of the Commissioner to make a valid assessment against James Duggan, deceased, it

should be sufficient to refer to the decision of this court in *Hulburd* v. *Commissioner*, 296 U. S. 300. The Court there held that an assessment against a discharged executor would not be valid if, under the law of the state which discharged the executor, such discharged executor was legally dead. This Court therefore examined the law of Illinois to determine the effect of the discharge of an executor by a court in that state. Having concluded that under the law of Illinois a discharged executor was not legally an executor at all, this Court held that no assessment against such a discharged executor would be valid for any purpose.

We believe this Court will take judicial notice of the fact that a dead person is really dead under the law of all the states. It must follow, therefore, that in the view of this Court no valid assessment could be made against a dead person.

Counsel state that an assessment against a dead man must be valid because the reports of the Board of Tax Appeals and the courts are filled with cases in which the assessment was made after the death or dissolution of the taxpayer (Brief, p. 34). They do not stop to consider whether the question of validity was raised or actually involved in the decisions. In the *Updike* case, and in *United States* v. *Crook*, 18 F. (2d) 449, the validity of assessments against dissolved corporations was not questioned by the parties or discussed by the courts. The decisions in three cases in the Court of Claims (*Muir* v. *United States*, 3 F. Supp. 619, and the two *Anderson* cases, 15 F. Supp. 216 and 225) which counsel admit are the "few cases we have found" (Brief, p. 35) in which the validity of such assessments has been questioned, merely hold that a tax actually owing which was timely paid by a deceased taxpayer's executor is not recoverable by suit even if an assessment was never made or was invalid. The Court of Claims does say that when the Commissioner assesses a tax he does not

assess it against any person and accordingly an assessment against a dead man is valid, but this is not only *dicta* but is clearly contrary to fact. Assessments made without the names of persons owing the taxes would be futile and meaningless and the certificate which is signed by the Commissioner as quoted by the court (15 Fed. Supp. 216 at p. 225) shows that the actual taxpayers are designated. The *dicta* in these cases are of course inconsistent with the decision of this Court in the *Hulburd* case, *supra*. *Anderson* v. *Bass*, 88 F. (2d) 185, cited by counsel in this connection (Brief, p. 35), has no bearing at all on this point.

In a recent income tax case, *Standifer Construction Co.* v. *Commissioner*, 78 F. (2d) 285, the Circuit Court of Appeals for the Ninth Circuit held that every step in a proceeding by or against a dissolved corporation after the expiration of the period fixed by state law for proceedings by or against dissolved corporations is invalid and of no effect. This rule should apply just as much to an assessment as to any other action taken against a defunct corporation. It should also apply in the case of the death of a natural person, as this Court has indicated in a decision cited in the *Standifer* case, *Oklahoma Gas Co.* v. *Oklahoma*, 273 U. S. 257, in which this Court said (p. 259):

> "There is no specific provision in our rules for the substitution as a party litigant of a successor to a dissolved corporation. It is well settled that at common law and in the federal jurisdiction a corporation which has been dissolved is as if it did not exist, and the result of the dissolution can not be distinguished from the death of a natural person in its effect. * * * It follows therefore that, as the death of the natural person abates all pending litigation to which such a person is a party, dissolution of a corporation at common law, abates all litigation in which the corporation is appearing either as plaintiff or defendant."

If no assessment against a dead person would be valid, then of course the jeopardy assessment in this case is

invalid. But there is an additional infirmity in this jeopardy assessment against James Duggan, deceased. This jeopardy assessment was made during a period when, according to Government counsel, an ordinary assessment could not be made. Clearly the suspension of the right to make an assessment would be meaningless if, during such suspension period, the Commissioner could at will make such an assessment anyway merely by calling it a jeopardy assessment. It must be true at least that if the so-called jeopardy assessment shows on its face that there is no jeopardy, then such an assessment cannot be held valid if made during the period of suspension.

Clearly a jeopardy assessment against a dead person carries on its face a denial of jeopardy. Jeopardy died with the death of James Duggan. There may have been jeopardy before he died, but that jeopardy ceased with his death and there was no property in this world which was formerly his which could be reached by a jeopardy assessment against him. In fact there was not so much jeopardy with reference to the property in his estate as there was in the case of the same property while James Duggan lived. It is submitted, therefore, that there is no ground on which the jeopardy assessment in this case can be recognized as valid.

It is conceded that if the Board proceeding necessarily abated with the death of James Duggan then even the jeopardy assessment was not in time to sustain the Government's contention. Or if the decision or order of the Board is to be treated as if made as of the date of the death of James Duggan, then also the jeopardy assessment, even if valid, would be too late. It cannot be true that such a Board proceeding could be continued indefinitely after the death of the petitioner, with interest continuing to accumulate on the tax claim, and then an order be finally entered and an assessment made which could be the basis

of a suit within the next six years against any one who might become a transferee of the decedent's property.

It is respectfully submitted that there are three separate and distinct grounds which require an affirmance of the decisions of the Court of Appeals and the District Court.

Herbert Pope,
Counsel for Continental National Bank and Trust Company of Chicago, solely as Trustee under Will of James Duggan, deceased, for the children of Timothy Duggan.

October 8, 1938.